IN THE HIGH COURT OF BOMBAY AT GOA

Appeal under E.S.I.No.2/2006

Employees State Insurance
Through its Deputy Regional
Director, Panchadeep Bhavan,
EDC, Plot No.23,
Patto, Panaji, Goa. ..... Appellant.

V/s.

1. M/s. Toyo Pharmaceuticals
Farooqui Mansion, main road,
Ponda, Goa.

2. Shri Mahesh Nagarsekar,
Behind Hotel Atish,
Farmagudi, Ponda, Goa. ..... Respondents.

Mrs. A. Agni, Advocate for the appellant.

Mr. N.N. Sardessai, Advocate for the respondent.

CORAM : SMT. RANJANA DESAI, J.

Date of reserving the Order :
30/06/2006.

Date of pronouncing the Order :
13/07/2006

O R D E R :

The respondent in Employees Insurance Case No. 63/2000 has challenged in this appeal, the judgment and order dated 28.2.2005 passed by the Presiding Officer, Employees State Insurance Court, Panaji, Goa. The respondents are original applicants 1 and 2

respectively. For clarity they are referred to as “the applicants''.

2. Before the rival contentions are considered, it is necessary to note that this appeal is filed under Section 82 of the Employees State Insurance Act, 1948 (`the said Act' for short). Under the said provision, an appeal shall lie to the High Court from an order of Employees State Insurance Court if it involves a substantial question of law. Therefore, unless the present appeal involves a substantial question of law, it cannot be entertained.

3. The original applicant 1 is a proprietory concern of original applicant 2 and it is registered under the Shops and Establishment Act. It is the case of the applicants that they have never employed nine or more employees and, as such, applicant No.1 is not covered under the said Act. According to the applicants, a show cause notice dated 31.3.1998 was received by them calling upon them to make payment of Rs.783/- for the period between February, 1982 to March, 1983. By order dated 29.8.1998, the appellant issued notice under Section 45-A of the said Act, directing the applicants to pay the sum mentioned in the show cause notice with interest at the rate of 15 % p.a. The applicants challenged the said order under Section 45-A of the said Act on the ground that since the applicants are not covered by the provisions of the said Act the said order is illegal, arbitrary and without jurisdiction. They also challenged notice dated 31.3.98.

4. The case of the appellant is that a survey was conducted by the respondent's inspector on 30.4.1982 when it was found that the applicants had employed more than nine employees and, therefore, the applicants' concern was brought under the purview of the said Act with effect from 1.1.1982. The applicants had applied for exemption vide their letter dated 10.12.87 in respect of medical representatives. According to the appellant, there is no provision for voluntary coverage under the said Act and once the coverage is extended, the establishment cannot go out of the coverage due to fall in the strength of employees of the establishment.

5. The applicants' examined AW1, Mahesh Nagarsekar. He stated that right from the inception the applicants had never employed more than nine employees. But, despite this, in the interest of the employees, the applicants had voluntarily applied for coverage under the said Act. He has further stated that at the request of the employees he requested the appellant to cancel its registration and, accordingly, stopped payment of contribution. He has further stated that in the report dated 17.2.1998, submitted by the appellant's inspector, it is clearly stated that there had been only six employees in the employment of the applicants.

6. The appellant examined RW.1 S.S. Nair who had

inspected the applicants' establishment on 30.4.1982. He has produced his inspection report dated 30.4.1982 Exhibit – 6 collectively. He has stated that there were twenty employees in the establishment at the time of the inspection.

7. The learned Judge has perused visit note of the inspector and observed that this note does not contain names, addresses or designations of the employees who were allegedly present in the establishment on the date of the inspection. The learned Judge has also perused the wage register from 1980 onwards which is at Exhibit 7 collectively. The learned Judge has made a categorical observation that these registers which are duly signed by the inspector and the genuineness of which is not disputed, clearly indicate that the applicants had not employed more than nine employees on any given date. It is in these circumstances that the learned Judge has refused to place reliance on the visit note of RW.1 S.S. Nair on the ground that it is very vague. The learned Judge has also referred to the chalans and the statements showing the details of recovery of contribution from the employees which are at Exhibit-8 collectively and observed that these documents indicate that the number of the employees from whom the contribution was recovered did not exceed nine and has then observed that this fortifies the contention of the applicants that they had sought voluntary coverage in the interest of the employees though they had not employed more

than ten employees in the establishment. Exhibit-11 is letter dated 23.2.97 sent by the applicants to the Regional Director informing him that they had sought coverage only to avail the benefits of the scheme. The applicants had informed the Regional Director that their employees were not interested in the scheme and had requested the respondent to cancel its registration.

8. Apart from the visit note of the inspector, the appellant has relied on letter dated 2.6.1983 which is at exhibit-20. This letter was addressed to the inspector by the applicants. It is stated in this letter that the applicants' firm was having eight workers in the production and six under the office staff. It is the case of the appellant that this indicates that the applicants had admitted that they have employed more than 10 employees. The applicants' case is that there is a typographical mistake in the said letter. According to the applicants, the number `6' which is before the word `under' was erroneously typed since the said letter `u' is under the number `6' and while typing letter `u' , the number `6' was wrongly typed and the mistake remained uncorrected. In support of this contention, the applicants have examined AW.2 Devidas Nagarsekar, author of this letter as well as AW.3 Benedict Rodrigues, the typist who had typed the said letter. The learned Judge has, after considering the evidence of these two witnesses, accepted the case of the applicants that there is a typing error in the letter Exhibit-12. The learned Judge has

observed that the statement made by the applicants in the affidavit that the inspector of the appellant had inspected the premises of the applicants on 22.9.97 and 17.2.98 and had stated in the report dated 17.2.98 that since December, 1996 there were only six employees in the employment and there are no changes in the wages has not been specifically denied by the appellant. In fact, in letter dated 30.7.1998 at Exhibit – 12 it is stated that the applicants' establishment had not employed more than nine employees till December, 1998.

9. In my opinion, the above appreciation of evidence made by the learned Judge cannot be faulted. It cannot be said that the learned Judge has not taken into account vital and material documents. The vice of perversity is not attached to the impugned order. This being an appeal, I have also carefully perused the records of the case and the evidence adduced by the parties and I do not find that the learned Judge has committed any error while appreciating the evidence. It is difficult to uphold the contention of the learned Counsel for the appellant that this appeal involves a substantial question of law. So far as the mistake in letter dated 2.6.89 is concerned, on appreciation of the evidence, the learned Judge has held that there is indeed a mistake in the said letter.

10. It was argued by the learned Counsel for the appellant that letter dated 30.7.98 which states that the applicants have not

employed more than nine employees till December, 1998 is just a xerox copy of the original. She contended that the respondent ought to have produced a certified copy of the said letter. She submitted that this letter is not admissible in evidence and, in any case, the contents of the document are not proved. In this connection, she referred to Sections 63 and 64 of the Evidence Act and contended that the Asst. Labour Commissioner ought to have been examined to prove its contents. This letter Exhibit-12 which the learned Counsel wants to be treated as inadmissible, is addressed by the Asst. Labour Commissioner to the respondents. It is clearly stated in this letter that after carrying out the inspection and on verification of the records from the period 1980 till date, it has been observed from the records maintained by the appellant that the appellant's establishment had never employed more than nine employees. No doubt it is a xerox copy, but it is significant to note that no objection was raised by the appellant to the mode of proof of this document at any stage. The learned Counsel for the appellant has relied on the Judgment of this Court in **Om Prakash Berlia and another vs. Unit Trust of India and ors.,** AIR 1983 Bombay 1 which says that a certified copy of a document would not be proof of contents thereof. It is submitted that to prove the contents, the Asst. Labour Commissioner ought to have been examined. It is pertinent to note that this point was never raised in the trial Court. A belated attempt is being made to persuade this Court to hold that there is a question

of law involved in this appeal.

11. Even, if it is assumed for moment that this letter is to be obliterated and kept out of consideration, the appreciation of the other evidence on record made by the learned trial judge is unassailable and on the basis of the other evidence, it can still be held that the applicants are not covered by the provisions of the said Act. It was argued that the coverage under the said Act is automatic and the fact that number of employees is less than 10 at a later point of time after the initial coverage, has no effect on the coverage of an establishment and the establishment continues to be covered. It is pertinent to note that sub-Section (6) of Section 1 which provides for such a coverage was inserted in the said Act by Act 29 of of 1989 w.e.f. from 16/5/90. In **Employees' State Insurance Corporation and anr. vs. Steel Engineers and anr.**, [2002 (93) FLR 764], the Gauhati High Court has considered this provision and held that the said provision has prospective effect. In the circumstances, I find that there is no substantial question of law involved in this appeal. Hence, this appeal is rejected.

SMT. RANJANA DESAI, J.

ssm.